

No. 11,853

IN THE  
United States Court of Appeals  
For the Ninth Circuit

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ARIZONA BARITE COMPANY

(a corporation),

vs.

*Appellant,*

WESTERN-KNAPP ENGINEERING CO.

(a corporation),

*Appellee.*

APPELLEE'S PETITION FOR A REHEARING.

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DEC -3 1948

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**APPELLEE'S PETITION FOR A REHEARING.**

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*To the Honorable William Denman, Presiding Judge,  
and to the Honorable Associate Judges of the  
United States Court of Appeals, for the Ninth  
Circuit:*

Comes now Western-Knapp Engineering Company, a corporation, the appellee in the above-entitled cause, and presents this, its petition, for a rehearing of the above-entitled cause, and, in support thereof, respectfully shows:

**I.**

That the above-entitled Court has decided the case according to the wrong principles of law in the following respects, to-wit:

(a) Neither Section 5 nor Section 8 of Article 14 of the Arizona Constitution, upon which the argument of appellant and the opinion of the Court are based, is self-executing.

(b) That Section 21-314 of the Arizona Code Annotated 1939, providing for substituted service on the Corporation Commission of Arizona, applies only to domestic corporations of the State of Arizona, and the service of November 13, 1947, is therefore invalid.

(c) The appointment of an agent, known as the statutory agent, by any corporation in Arizona, either foreign or domestic, is revocable, and the service of April 28, 1947, upon Keller, was therefore invalid, his appointment having been revoked before that date.

(d) That Section 53-309, Arizona Code Annotated 1939, pocket part, was not retroactive. (See Section 1-101, *Arizona Code Annotated* 1939.)

(e) Section 3305 of the California Corporations Code (formerly Civil Code Section 402a) which was in effect when appellee corporation was dissolved, gives appellant a clear guide to service of due process, and the proper parties to be served.

(f) By said Section 3305 and by the other sections of the California Code requiring provision for payment of obligations as a condition precedent to dissolution of corporations, appellant is, as a practical matter, in a position more favorable than under Arizona law, since Arizona law made no provision for service on dissolved corporations and now makes no provision for payment of obligations.



(g) The Supreme Court of the State of Arizona interpreting Sections 21-306 to 21-309 of the Arizona Code has stated that the only proper method of serving a foreign corporation that has no resident agent is by publication.

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### ARGUMENT.

(a) NEITHER SECTION 5 NOR SECTION 8 OF ARTICLE 14 OF THE ARIZONA CONSTITUTION IS SELF-EXECUTING.

Section 5 provides:

“No corporation organized outside of the limits of this state shall be allowed to transact business in this state on more favorable conditions *than are prescribed by law* for similar corporations organized under the laws of this state.  
\* \* \*” (Emphasis supplied.)

A constitutional provision is not self-executing if there is language indicating that the subject is referred to the legislature for action.

11 *Am. Jur.* p. 692, Constitutional Law, Section 74, note 11.

Where a constitution provides, for example, that debts of corporations shall be secured by the individual liability of the stockholders and *such other means as shall be provided by law*, such provision has been construed as not self-executing because the language used plainly contemplates that legislation is necessary in order to make it effectual.

*Ibid.*, Sec. 75, note 8.

It would seem that the language used in Section 5 of Article 14 of the Arizona Constitution contemplates that the conditions for transacting business by corporations in the state should be provided by law, and that the section was addressed to the legislature rather than to the Courts.

Section 8 provides:

“No domestic or foreign corporation shall do any business in this state without having \* \* \* an authorized agent, or agents, in the state upon whom process may be served. \* \* \*”

This Section 8 is almost identical with the provision on the same subject in the Arkansas Constitution. It was construed to be not self-executing in *St. Louis, A. & T. Co. v. Fire Ass'n of Phila.*, 60 Ark. 325, 30 S.W. 350, 28 L.R.A. 83. At p. 352 of 30 S.W. the Court said:

“The appellant contends that the evidence failed to show that the Commercial Company complied with Section 11, Art. 12, of the constitution. This section declares that ‘no foreign corporation shall do business in this state, except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served’. It is not self-executing. It does not provide how the agent shall be designated, or how the place of business shall be made known. The Commercial Company had no right to say upon what agent process may be served. The legislature alone had the right. Until it exercised it, there was no penalty for the violation of the constitution in that respect.”



This case was decided in 1895. The Arizona Constitution became effective upon the admission of the territory into the Union in 1912, having been formally adopted before that.

Where a constitutional provision has been borrowed from another state after it has been construed by the Court of last resort of such state, the general rule is that the construction in such other state is adopted with the provision.

11 *Am. Jur.* p. 685, Constitutional Law, Sec. 68.

It is not fully apparent that Arizona borrowed this Section 8 from Arkansas, since similar provision was in the constitutions of other states, e.g., California and Utah. But we have found no construction of it in any other state, the Arkansas case being the only one that has come to our attention.

That Section 5 and Section 8 of Article 14 of the Arizona Constitution were assumed to be self-executing is implicit in the argument of appellant and in the decision of this Court, and we respectfully submit that both appellant and the Court erred in making that assumption.

Since the Arizona constitutional provisions are not self-executing, resort must be had to the Arizona statutes.

(b) SECTION 21-314 OF THE ARIZONA CODE ANNOTATED 1939  
APPLIES ONLY TO DOMESTIC CORPORATIONS OF THE  
STATE OF ARIZONA.

The statutes of Arizona set out in the opinion of this Court do not include foreign corporations in the same classification as domestic corporations. These statutes mentioned them separately and distinctly and treat of them separately. Even Section 5 and Section 8 of Article 14 of the Arizona Constitution distinguish them.

Section 21-305 of the Arizona Code mentions them separately though it applies the same rule to both.

While Section 53-305 treats of "corporations" without distinguishing between domestic and foreign, Sec. 53-801 treats of foreign corporations only, as do 53-802 and 53-804.

Coming down to Sec. 21-314, this section, providing for service of process by depositing the summons in the office of the Corporation Commission, treats only of domestic corporations and nowhere mentions foreign corporations. No section of the Arizona code makes specific provision for serving a foreign corporation by so depositing the summons with the Corporation Commission.

Since the legislature of Arizona made no provision for service on appellee in such manner, the service of November 13, 1947 was ineffectual.

(c) THE APPOINTMENT OF AN AGENT, KNOWN AS THE STATUTORY AGENT, BY ANY CORPORATION IN ARIZONA, EITHER FOREIGN OR DOMESTIC, IS REVOCABLE.

Cases on this point hold that the appointment of a statutory agent is irrevocable *upon the basis of some language in a statute involved.*

23 *Am. Jur.* p. 535, Foreign Corporations Sec. 514, note 18.

One section of the Arizona statutes, Sec. 53-507, recognizes that the agency of a domestic corporation may be revoked and provides a penalty for revocation, namely dissolution. But no section of the Arizona Code says that the agency of a foreign corporation may not be revoked or that it may be revoked, and no penalty is provided for revoking. The silence of the legislature in executing the constitutional provisions in this respect is significant. And it becomes a matter of pure speculation as to what the legislature intended, if it had any intention at all on this point. It would have been a simple matter for the legislature to have adopted an anti-revocation statute as so many other states have done and on which cases denying the privilege of revocation have been based.

In the absence of a statute on the subject, the agency is revocable. *Williams v. Mutual Reserve Fund L. Assn.* (1907), 145 N.C. 128, 58 N.C. 802, 13 Ann. Cases 51.

- (d) SECTION 53-309, ARIZONA CODE ANNOTATED 1939, POCKET PART, STATING HOW A DISSOLVED CORPORATION MAY BE SERVED IS NOT RETROACTIVE.

Section 1-101 of the same code provides: "No statute is retroactive unless expressly so declared therein." Sec. 53-309 was effective ninety days after March 25, 1947, and nothing in it indicates that it was intended to relate back either to the time of dissolution of appellee corporation or to the beginning of appellant's suit or to the service on Keller, or that it was intended to apply to such suit already begun so as to validate service attempted on November 13, 1947.

In fact its very passage was a persuasive indication of legislative cognizance of the omission in the statutes of any provision relating to service on dissolved corporations.

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- (e) SECTION 3305 OF THE CALIFORNIA CORPORATIONS CODE (FORMERLY CIVIL CODE, SEC. 402a) WHICH WAS IN EFFECT WHEN APPELLEE CORPORATION WAS DISSOLVED, AND STILL IS IN EFFECT, GIVES APPELLANT A CLEAR GUIDE TO SERVICE OF DUE PROCESS, AND TO THE PROPER PARTIES TO BE SERVED.

This section (of which Sec. 53-309 (c) A.C.A. 1939 is substantially a rescript) gives appellant every facility for the prosecution of its suit. The Section reads:

"Service on dissolved corporation. Summons or process against a dissolved corporation may be served by delivering a copy thereof to an officer, director, or person having charge of its as-

sets, or if no such person can be found, to any person who is, or at the time of dissolution was, an agent for service of process. If no such person can be found summons or process may be served upon the dissolved corporation by delivering a copy thereof to the Secretary of State or an assistant or deputy secretary of state."

Appellant adopted none of the methods thus provided for it. It made no attempt to serve the directors of the appellee J. N. How, J. H. How and Clara How, referred to on page 2 of the Court's opinion.

(f) The Arizona Code requires no provision for payment of outstanding obligations of a corporation dissolving. It made no provision for service upon a dissolved corporation, even though the corporation remained in existence for the purpose of winding up its affairs. The position of the appellant is therefore made more favorable, as a practical matter, than under the very sketchy Arizona laws.

(g) The Supreme Court of Arizona has settled the question before the Court in the case of *D. W. Onan & Sons v. Superior Court*, 179 Pac. (2d) 243. In interpreting Sections 21-306 to 21-309 of the Arizona Code the Court ruled that the only proper method of serving a foreign corporation in an action arising out of business transacted by such corporation within the state, where the foreign corporation had no resident agent or officer within the state, was by publication.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing



be granted and that the judgment of the District Court be, upon further consideration, confirmed.

Dated, December 1, 1948.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, December 1, 1948.

ARTHUR P. SHAPRO,  
*Of Counsel for Appellee  
and Petitioner.*



. Allen:

Vol. 2, we have not any for  
Office.

Yours truly,  
Chas Strather,  
Clerical Ass't.

